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No. 91-287

In The

Supreme Court of the United States

October Term, 1991

CHESAPEAKE INSURANCE COMPANY LIMITED,

Petitioner,

vs.

CONSTANCE B. FOSTER, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine & Inland Insurance Company,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

STEVEN M. PESNER
ANDERSON KILL OLICK & OSHINSKY, P.C.
Counsel of Record for Petitioner Chesapeake Insurance Company Limited
666 Third Avenue
New York, New York 10017
(212) 850-0738

On the Brief:
DAVID M. ZENSKY

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Petitioner Chesapeake Insurance Company Limited ("Petitioner" or "Chesapeake") respectfully submits this Reply Brief in further support of its Petition For Writ of Certiorari ("Pet.") pursuant to Supreme Court Rule 15.6. This Brief is submitted in order to address certain arguments first raised in the Brief in Opposition ("Br.Opp.") of Respondent Constance B. Foster, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire Marine & Inland Insurance Company ("Respondent").

Respondent asserts that review of the judgment below is precluded by 28 U.S.C. Section 1447(d) (1991), and that Petitioner somehow has changed its construction of 28 U.S.C. Section 1447(c) (1991) (respectively, "Section 1447(d)" and "Section 1447(c)"). Br.Opp. 7-9. Respondent further asserts that a certain Stipulation and Order entered in the district court ("Stipulation") properly extended the statutory time limit governing Respondent's motion to remand. Br.Opp. 9.

As set forth below, because the district court exceeded its statutory remand authority under *any* characterization of Section 1447(c) and the order at issue, appellate review is not precluded by Section 1447(d). Moreover, Respondent's claims with respect to the record below are incorrect, deceptive and misleading. Finally, the Stipulation, which was not relied on below by either party or the district court (App. 9)[1], in no way deprives

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[1] "App." refers to the Appendix to Chesapeake's Petition For Writ of Certiorari. "Rpl.App." refers to the Appendix to this Reply Brief.

this Court of jurisdiction; nor does it undermine the reasons set forth by Chesapeake in support of its Petition for Writ of Certiorari.

ARGUMENT

I. THERE IS NO BAR TO REVIEW BY THIS COURT

The Court of Appeals below held that Section 1447(c) was inapplicable to Respondent's remand motion, but that the district court nonetheless was authorized to remand this action based on powers extrinsic to Section 1447(c). App. 14-20. In its Petition, Chesapeake argued, *inter alia*, that this was improper. Pet. 6-10. Rather, Chesapeake has asserted that a motion to remand on the basis of a purported forum selection clause properly should be considered as grounded in Section 1447(c)'s grant of remand authority to cases involving procedural defects. Pet. 10-15.

Respondent seeks to invoke Section 1447(d) to bar review. Section 1447(d) provides that, with the exception of cases originally removed pursuant to 28 U.S.C. Section 1443, a remand order "is not reviewable on appeal or otherwise". Respondent maintains that Chesapeake's argument respecting Section 1447(c) renders the matter nonreviewable pursuant to Section 1447(d). Br.Opp. 6-7, 9.[2]

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[2] Simultaneously, Respondent states that it disagrees with Petitioner's argument respecting Section 1447(c) and that review therefore *is* appropriate. Br.Opp. 1-2, 6.

Under the facts and circumstances present in this case, Section 1447(d), for several reasons, has no impact on the availability of review by this Court. *See* Pet. 1.

As acknowledged by Respondent, this Court has held that Section 1447(c) and Section 1447(d) "must be construed together". Br.Opp. 7 (citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976)). Thus, in *Thermtron*, this Court held, *inter alia*, that only those remand orders properly issued pursuant to a district court's statutory authority under Section 1447(c) are immunized by Section 1447(d) from review. 423 U.S. at 343-52. "[W]e are not convinced that Congress ever intended [through Section 1447(d)] to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds which seem justifiable to them but which are not recognized by the controlling statute". *Id.* at 351.

Since *Thermtron*, all Courts of Appeals to address the issue have agreed that where an action is remanded for reasons other than those recognized by Section 1447(c), the matter fully is reviewable, notwithstanding Section 1447(d). *E.g., In Re Shell Oil Company*, 932 F.2d 1518, 1518-21 (5th Cir. 1991); *In Re Delta America Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990); *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984); *Levy v. Weissman*, 671 F.2d 766, 769 (3d Cir. 1982).

Here, both the district court and Third Circuit expressly held that the action should be remanded to state court based on purported district court remand

authority wholly independent of Section 1447(c); indeed, both Courts expressly held Section 1447(c) (and its mandatory thirty day time limit) to be inapplicable. App. 9-20, 29-37. Accordingly, under settled law, the judgment below plainly is reviewable. Given the actual disposition by the Third Circuit, the judgment is reviewable irrespective of Chesapeake's various arguments on appeal.

Moreover, even if this Court was to disagree with the Third Circuit below and hold, as Chesapeake asserts, that Respondent's remand motion *was* encompassed by Section 1447(c), review still would be unaffected by Section 1447(d) because Respondent failed to comply with Section 1447(c)'s mandatory thirty (30) day time limit.

As set forth in Chesapeake's Petition, Section 1447(c) imposes a strict thirty (30) day time limit on remand motions, unless premised on a lack of federal subject matter jurisdiction. Pet. 1-2, 11. Here, however, Respondent concededly first sought remand fifty-four (54) days after removal. Br.Opp. 9; App. 4. Thus, at the close of the thirty (30) day period, the district court's statutory power to entertain Respondent's remand motion terminated, and by remanding the action once the statutory time limit had expired, the district court "exceeded its statutorily defined power". *Thermtron*, 423 U.S. at 351. Under these circumstances, Section 1447(d) cannot act as a bar to appellate review. *Id.* Indeed, the only two appellate decisions to address the reviewability of a remand order issued in derogation of Section 1447(c)'s time limit have both, in accord with *Thermtron*, found the appellate bar of Section 1447(d) to be inapplicable. *Shell Oil*, 932 F.2d at 1520-21 & n. 5 (Section 1447(d) would not preclude review of untimely remand for procedural defects); *Air-*

Shields, Inc. v. Hon. John P. Fullam, 891 F.2d 63, 65-66 (3d Cir. 1989) (vacating untimely remand order as exceeding district court's statutory authority).

Respondent appears to assert that the Stipulation renders the remand order timely and, therefore, non-reviewable. Br.Opp. 4 n.5, 9. Respondent's contention is unavailing since the statutory time limit imposed by Section 1447(c) may not be extended. *See, e.g., Air-Shields*, 891 F.2d at 65-66; *Cf.* Fed.R.Civ.Proc. 6(b) (parties may only extend time limits set by the court, the Federal Rules or a notice issued thereunder).[3] Petitioner believes that an extended discussion of the merits of Respondent's claim is unwarranted at this stage. *See* Supreme Court Rule 14. Suffice it to say, Respondent's assertion in no way deprives this Court of jurisdiction or precludes the availability of a Writ of Certiorari; rather, it simply may add an additional question should this Court choose to review the instant matter, as urged by Petitioner. (It bears noting, however, that, at no point in these proceedings has respondent provided authority for the proposition that Section 1447(c)'s time limit lawfully may be extended.)

Finally, Respondent claims that Petitioner somehow has changed its arguments in this Court from those made before the Third Circuit, and should be "estopped" from

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[3] In both the district court and the Third Circuit, Petitioner argued that the time limit imposed by Section 1447(c) is, in effect, jurisdictional, and thus, not subject to enlargement or waiver. Rpl.App. 5-8 (excerpts from Petitioner's Court of Appeals brief). Since the Third Circuit and district court both held that Section 1447(c)'s time limit was not controlling, neither Court addressed Petitioner's argument that Section 1447(c)'s time limit can not be extended.

arguing that the remand motion at issue was subject to Section 1447(c). Br.Opp. 7-8. Respondent's claim underlies its effort to escape the impact of the recent Fifth Circuit decisions invoked by Chesapeake's Petition, and the resulting conflict with the judgment of the Third Circuit. Pet. 10-15. Respondent brazenly has mischaracterized the record.

Throughout the course of this litigation, Petitioner consistently has maintained that remand of the action to state court was unlawful for *each* of the several reasons set forth in the Petition. Thus, in the district court, the Third Circuit and this Court, Chesapeake asserted that the district court lacked proper authority to even entertain Respondent's motion to remand because the motion *either* was: (1) in violation of the mandatory thirty day time limit set forth in Section 1447(c) *or* (2) outside the scope of remand powers enacted by Section 1447(c) and, therefore, invalid. App. 29-37 (district court opinion; addressing both issues); App. 9-20 (Third Circuit opinion; same); Pet. 6-15. Indeed, while quoting an isolated passage from Petitioner's papers submitted to the Third Circuit, Respondent omits to disclose that Petitioner's *leading* argument on appeal was the same argument respecting Section 1447(c) that Respondent now claims Petitioner somehow should not be permitted to assert. *See* Rpl.App. 1-5. Simply put, there is no merit whatsoever to Respondent's claim that Petitioner should be estopped from raising certain arguments.

CONCLUSION

For the foregoing reasons and those set forth in its Petition, Chesapeake respectfully requests that this Court issue a Writ of Certiorari to the Court of Appeals for the Third Circuit to review the Questions Presented as set forth in the Petition.

Dated: New York, New York
October 2, 1991

Respectfully Submitted

STEVEN M. PESNER
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0738

Attorneys for Petitioner Chesapeake Insurance Company Limited

On the Brief:
DAVID M. ZENSKY

APPENDIX

* * *

A. The District Court Was Without Authority To Grant a Non-Jurisdictional Remand Motion Made Outside of The Statutory Thirty (30) Day Time Limit

The exclusive procedures governing the remand of a diversity action removed pursuant to 28 U.S.C. §§ 1441(a) and 1446 are set forth in 28 U.S.C. § 1447(c). *Thermtron*, 423 U.S. at 342, 96 S.Ct. at 588-89 (case removed under 28 U.S.C. §§ 1441(a) and 1446 "may be remanded only in accordance with [28 U.S.C.] § 1447 which governs procedure after removal").

Although Plaintiff's motion to remand was not made within the thirty (30) day time limit provided by Section 1447(c), the district court held it had the power to remand this case to the Commonwealth Court of Pennsylvania. In holding that it had such authority, the district court erred.

Section 1447(c) was revised by Congress in 1988.[8] In pertinent part, Section 1447(c) now states:

> Procedure after removal generally
>
> A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district

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[8] The amendments to Section 1447(c) were effective upon passage, i.e., November 19, 1988. *Air-Shields*, 891 F.2d at 65. This action was commenced on or about September 29, 1989.

> court lacks subject matter jurisdiction, the case shall be remanded.

Thus, under Section 1447(c) as in effect when this action was commenced, apart from motions to remand based on an alleged lack of subject matter jurisdiction, there is *no exception* to the thirty (30) day time limit. Since Plaintiff never has alleged any defect in subject matter jurisdiction, the district court had no authority to entertain Plaintiff's motion to remand once the thirty (30) day time limit expired.[9]

Although the thirty (30) day time limit has been in effect for only two years, this Court already has had the opportunity to make clear that compliance with this time limit is mandatory and that contravening remand orders must be vacated. *Air-Shields, Inc. v. Fullam, supra,* 891 F.2d 63.

In *Air-Shields,* the district court remanded the action to state court, *sua sponte,* on the ground that the defendant had failed to file its removal petition within the thirty (30) day time limit set forth in 28 U.S.C. § 1446(b). *Id.* at 64. This Court held that the remand order violated Section 1447(c)'s thirty (30) day time limit, and granted a writ of mandamus to vacate the remand:

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[9] As discussed below, Chesapeake also rejects the proposition that a district court has authority to remand where the basis alleged is a contractual clause. Infra at 19-26. However, assuming such authority does exist, it can derive *only* from Section 1447(c)'s authorization to remand cases involving a "defect in removal procedure"; such authority, therefore, necessarily would be constrained by the applicable statutory thirty (30) day time limit.

> Even if the district court's *sua sponte* action qualifies as a motion under the revised 28 U.S.C. § 1447(c), the district court could only remand within 30 days of the filing of the notice of removal. Here the district court issued its remand order more than seven months after the defendant filed its removal petition. *Revised Section 1447(c) prohibits such untimely remand. . . .*
>
> By remanding the case for procedural defects after the thirty day limit imposed by revised Section 1447(c) had expired, the district court 'exceeded [its] statutorily defined power'.

891 F.2d at 65-66 (emphasis supplied) (footnote & citation omitted). Since this Court determined that the remand exceeded the district court's authority, the correctness of the district court's basis for remand (its finding that removal had been improper) was irrelevant.[10]

As noted, the current Section 1447(c) is the product of a recent revision to the statute by Congress. The district

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[10] In accord with this Court's *Air-Shields* decision, numerous other courts have denied remand motions made after the expiration of the thirty (30) days, even where such motions, if timely, would have been granted. *E.g., Winners Corporation v. Lafayette Life Insurance Company,* 734 F. Supp. 812, 814-15 (M.D. Tenn. 1989) (removal was defective but § 1447(c)'s time limit "precludes the Court from considering the plaintiff's untimely motion to remand"); *Gray v. Moore's Business Forms, Inc.,* 711 F. Supp. 543 (N.D.Cal. 1989) ("removal was procedurally improper for two reasons" but remand denied; plaintiff "failed to comply with the clear mandate of [§ 1447] subsection (c) that a motion to remand *must* be made within thirty days"); *Taylor v. St. Louis Southwestern Railway Co.,* 128 F.R.D. 118 (D.Kansas 1989) (action removed in violation of § 1441(b) but remand denied).

court's refusal to comply with Section 1447(c)'s time limit was in clear derogation of Congress' intent and purpose in amending the statute.

Prior to 1988, Section 1447(c) contained no time limit for remand motions. Instead, in pertinent part, it stated as follows:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

See Levy v. Weissman, 671 F.2d 766, 768 n.7 (3d Cir. 1982).

In 1988, pursuant to the Judicial Improvements and Access to Justice Act, Pub.L. 100-702, 102 Stat. 4642, Congress substantially revised several provisions of the removal and remand statutes (28 U.S.C. §§ 1441-1452), including Section 1447(c). *See generally, Air-Shields*, 891 F.2d at 65.

In imposing the thirty (30) day time limit on non-jurisdictional remand motions, Congress explained its intent and purpose as follows:

> Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. *So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal Courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction.* . . . The amendment provides a period of *30 days* within which

> remand *must* be sought on *any ground* other than lack of subject matter jurisdiction.

H.R. 100-889 at 72, 100 Code Cong. & Adm. News at 6033 (emphasis supplied). Thus, Congress clearly has required that *"any"* remand motion which does not allege a lack of subject matter jurisdiction *"must"* be sought within the statutory thirty (30) day period.

Here the district court's authority to order remand only could have been based on Section 1447(c). *Thermtron*, 423 U.S. at 342, 96 S.Ct. at 588-89; *see infra* at 20-26. Because Plaintiff's motion was not premised on any alleged defect in subject matter jurisdiction, it was subject to Section 1447(c)'s mandatory thirty (30) day time limit. In light of Congress' clearly expressed legislative intent in enacting the thirty (30) day time limit and this Court's ruling in *Air-Shields* that a remand order issued in violation of such time limit exceeds "statutorily defined power", the district court below lacked authority to grant Plaintiff's untimely motion. Accordingly, the district court's remand order should be reversed.

* * *

C. There Was No Valid Tolling Of The Thirty (30) Day Time Limit For Plaintiff's Remand Motion

There is no dispute that Plaintiff's remand motion was made well after the expiration of the statutory thirty (30) day time limit. To be sure, Plaintiff did request that Chesapeake stipulate to extend Plaintiff's time to "file a motion to remand, based on any defect in the removal

procedure under 28 U.S.C. § 1447(c)". Chesapeake's counsel executed a stipulation prepared by Plaintiff's counsel, and the district court approved it. App. 302.

This stipulation, however, has *no impact* on the validity of the district court's remand order.

First, in urging that the remand motion was timely filed, Plaintiff's counsel disclaimed any reliance on this stipulation. App. 14 (the stipulation "has no bearing on the motion" before the court). Nor did the district court invoke the stipulation in purporting to find authority to remand this case. App. 81 (Plaintiff "is not relying, and cannot rely, on the stipulation").

Moreover, the statutory thirty (30) day time limit is non-waivable and non-enlargeable. The clear import of Congress' intent in amending Section 1447(c) is that all non-jurisdictional remand motions, in Congress' words "*must*" be made within the thirty (30) day statutory period. Plainly, "must" cannot be read to mean "must unless the parties decide otherwise". Consistently, therewith, this Court's *Air-Shields* decision held that the district courts lack all *power* to remand for non-jurisdictional reasons after the statutory thirty (30) day time limit expires.

Further support is found in the district court's construction of Section 1447(c)'s sister statute, 28 U.S.C. § 1446(b), which imposes a thirty (30) day time limit for effecting removal. This statutory time period has been held absolute and not subject to extension or enlargement, whether by stipulation or court order. *E.g., Capone v. Harris Corp.*, 694 F. Supp. 111, 112 (E.D.Pa. 1988) (thirty day period of § 1446(b) is mandatory and cannot be

extended by the Court"); *Balestrieri v. Bell Asbestos Mines, Ltd.*, 544 F. Supp. 528, 529 (E.D.Pa. 1982) (same); *Tyler v. Prudential Insurance Company*, 524 F. Supp. 1211, 1213 (W.D.Pa. 1981) (thirty day limit of § 1446(b) "cannot be extended by consent of the parties"); *Crompton v. Park Ward Motors, Inc.*, 477 F. Supp. 699, 701 (E.D.Pa. 1979) (same).

The reasoning underlying such strict construction of the removal statute is deference to Congressional intent:

> The overwhelming authority holds that although an untimely petition for removal does not create a jurisdictional defect, the time limit established by the removal statute is mandatory and must be strictly enforced to comply with Congressional intent in fashioning § 1446(b). . . . The removal statute was drafted by Congress, not the federal courts. If Congress had wanted to allow the courts to examine [equitable considerations in support of untimely petitions] it could easily have done so by drafting appropriate legislation.

Village Improvement Ass'n of Doylestown v. Dow Chemical Co., 655 F. Supp. 311, 314-15 (E.D. Pa. 1987).[13] Significantly, when Congress *did* desire an exception to this mandatory thirty (30) day bar, it expressly legislated such exception. *See* 28 U.S.C. 1441(d) ("time limitations of

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[13] The *Dow Chemical* Court also rejected the contention that Rule 6 of the Federal Rules of Civil Procedure provided it authority to extend the thirty (30) day time period since the rule authorizes the enlargement only of those time periods set by the federal rules themselves, notice given thereunder or by an order of court. 655 F. Supp. at 315; *see* Fed. R. Civ. Pro. 6.

§ 1446(b) . . . may be enlarged at any time for cause shown" where action to be removed is against a foreign state). Such legislation would be redundant if Congress understood that litigants or district courts had the power to vary the time limit.

This reasoning is fully applicable here. Congress unambiguously has placed a mandatory time limit on remand motions, subject only to exception for a lack of subject matter jurisdiction. Sections 1446(b) and 1447(c), each with thirty (30) day time limits, should be construed in *pari materia;* thus, the latter, like the former, should be held non-extendable, either by the parties or the court. *See* 2A Sands, *Sutherland Statutory Construction,* § 51.03 (4th Ed. 1984 rev.) at 467-69.